

83-67-I

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April 17, 1984

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Mr. Maurice L. Cormier
Assistant Road Toll Administrator
Division of Motor Vehicles
Hazen Drive
Concord, New Hampshire 03301

Re: Refund Request of Rich Plan of Northern New England

Dear Mr. Cormier:

You have asked, in connection with the above request, whether the State is required to refund road tolls paid to the State for gasoline purchased in New Hampshire upon which the purchaser is later required to pay a use tax to another state on the same gasoline. It is our opinion that the purchaser is not entitled to a refund unless it meets all of the requirements of Rule Saf-M 314.07.

RSA 260:32 imposes a road toll of 9 cents per gallon on the sale of each gallon of motor fuel sold, with certain exceptions not applicable here, to be collected by the distributor from the purchaser and paid to the State. Subsequent sections impose supplemental tolls of varying increments. Under RSA 260:35, the tolls are to be used to pay the interest and principal due on any bonds and notes issued pertaining to highway purposes, with the remainder paid into the highway fund for construction and maintenance of state highways. N.H. Const., Pt. II, Art. 6-A.

The Division has provided by rule for the precise situation addressed by the present refund request. Rule Saf-M 314.07 provides that



[w]hen any person operating any New Hampshire registered vehicle which is powered by gasoline, is required to pay a tax or toll on gasoline consumed in another state ..., where said gasoline was purchased and a toll paid thereon in New Hampshire, said person shall be entitled to a refund in the amount of the tax or toll paid to the state of New Hampshire on said gallonage, if said person meets the requirements set forth in this section.

(a) All applicants for such refunds shall, within ninety (90) days from the date upon which the tax or toll is paid to the other state ..., submit an application for refund to the road toll administration. (emphasis added)

The rule further sets forth the required contents of a refund application and specific requirements for supporting documentation. Finally, subsection (d) of the rule provides that

[r]efund applications shall be denied for any of the following reasons:

(1) gasoline was purchased either prior or subsequent to the beginning of the applicable reporting period.

(2) any evidence of erasures or changes in amounts on any receipt or invoice.

(3) failure to comply with any requirement set forth in paragraphs (a) or (b) of this section. (emphasis added)

In the present case, application by letter for a road toll refund of \$2,888.68 was made to your office on May 9, 1983 concerning gasoline use taxes paid to the State of Maine on December 16, 1982 on gasoline purchased in New Hampshire. Although the information provided to me does not indicate whether the applicant has fully complied with the the rest of Rule Saf-M 314.07, it is evident that the refund request was not made within 90 days after payment of the tax to the State of Maine as required by subsection (a) of the rule. Under subsection (d)(3) of the rule, the Division not only may, but must, deny the refund request.

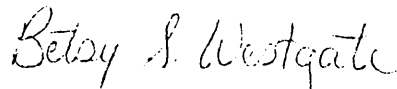
The applicant has pointed out in its refund request that RSA 260:47, relative to refunds of road tolls, provides that applications for refunds shall be filed "no later than the deadline for filing with the federal government for refund of the federal excise taxes on fuel." However, Rule Saf-M 317.07(a) is not inconsistent on its face with this provision. Since the statute requires applications to be filed "no later than" the federal excise tax deadline, nothing prevents the Division from setting a shorter deadline. More importantly, however, the refunds authorized by RSA 260:47 are to persons "who shall use any motor fuel, with respect to which the road toll has been paid, in any way other than in motor vehicles for the purpose of generating power for the propulsion thereof upon a way" The section refers on its face to clubs for snow traveling vehicles and is intended to apply to the purchase of fuel for use in recreational and other types of equipment. Since RSA 260:47 thus does not appear to cover or require refunds for the use of gasoline by motor vehicles in other states, it does not govern deadlines set for such refund requests. Moreover, while Rule Saf-M 314.07 might conceivably be subject to challenge, if at all, as permitting a refund not authorized by statute, as the rule operates to the benefit of the refund applicant it would in all likelihood be enforced by a court. See, Appeal of Denman, 120 N.H. 568 (1980). It is therefore our opinion that Rule Saf-M 314.07 may be enforced by the Division according to its terms.

The applicant has also raised a constitutional question concerning any denial of its refund request, essentially on the basis that a refund by New Hampshire is mandatory in order to avoid double taxation. It is normally our policy not to offer an opinion on the constitutionality of a statute or rule which is otherwise being properly applied because it would be our responsibility to defend the validity of the statute or rule in any subsequent court action challenging the enactment. However, although it is correct that the road toll has been held to be a charge for the use of fuel in highway travel rather than a sales tax, we are not persuaded that the toll is identical in nature or purpose to the gasoline use tax imposed by the State of Maine or that the denial of a refund request which fails to comply with the governing rule otherwise might constitute unconstitutional double taxation. Of course, the taxpayer here failed to comply with the specific provisions of Rule Saf-M 314.07 which would authorize the refund. In addition, the toll has been held valid although New Hampshire does not impose a corresponding tax on fuel purchased outside the State but used in New Hampshire, see, Tirrell v. Johnston, 86 N.H. 530, 535 (1934), and constitutional limits on taxation may not even apply. See, Opinion of the Justices, 94 N.H. 513, 514 (1947), Opinion of the Justices, 81 N.H. 552 (1923). See also, RSA 260:53, providing for reciprocal imposition of additional taxes and tolls levied by other states.

You have also asked whether any limitation relating to the time of purchase or use of the gasoline in question, here, covering an nine-year period, applies to this refund request. The answer to this question is "no," and derives directly from Rule Saf-M 314.07. Since a refund application is timely as long as it is filed within 90 days after payment of the gasoline tax or toll to the other state, the time of purchase or use of the gasoline is irrelevant. It should also be noted that in the present case, the tax liability to Maine did not become evident to the taxpayer until mid-1982, when the Maine audit was completed, although the use of the gasoline dated from 1973. As stated above, however, the application was itself untimely and must be denied by the Division under Rule Saf-M 314.07.

If you have further questions, please let me know.

Very truly yours,



Betsy S. Westgate
Assistant Attorney General
Division of Legal Counsel

BSW:ab

cc: Mr. Richard M. Flynn, Commissioner
Mr. Earl M. Sweeney, Deputy Commissioner
Mr. Thomas A. Power, Director

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